No. 12727

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of

CALIFORNIA STATE BOARD OF EQUALIZATION,

Appellant,

vs.

GEORGE T. GOGGIN, Trustee in Bankruptcy of the Estate of West Coast Cabinet Works, Inc.,

Appellee.

AMICUS CURIAE BRIEF.

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AMICUS CURIAE BRIEF.

This Court has made an Order permitting the within brief to be filed herein by the undersigned as *Amicus Curiae.*

We are likewise permitted to so join in the proceedings before the District Judge.

The problem presented herein is of great interest to us far beyond the academic interest which we have in the determination herein, inasmuch as we represent various trustees and receivers in bankruptcy who are currently confronted with the same problem.

It is our firm opinion that the question of whether or not the state agency could affix a sales tax to bankruptcy liquidation sales was definitely settled by this Honorable Court in the case of *State Board of Equalization v. Boteler,*

131 F. 2d 386 (affirming decision of U. S. District Judge Ben Harrison in *Davis Standard Bread Co.,* 46 Fed. Supp. 841).

In the case at bar the record shows that the trustee in liquidating the assets of the bankrupt estate sold five automobile trucks to five separate individuals pursuant to the Order Confirming the said sales of the Referee. The State Board of Equalization attempted to assess the trustee with a sales tax thereon.

Upon a hearing in which an injunction was issued, the Referee in Bankruptcy, before whom the said estate was being administered, determined that the sales were not made by the trustee in the course of conducting the business of the bankrupt and that the trustee was not liable for any sales tax.

Statements of Facts.

We set forth as the Statement of Facts herein the following, which is taken verbatim from the Opinion of the District Judge:

> "The bankrupt herein, West Coast Cabinet Works, Inc., a corporation, was engaged in the business of manufacturing and selling cabinets and filed sales tax returns and paid sales tax under the California Sales and Use Tax Law. On February 5, 1946, the corporation filed a petition under Chapter XI of the Bankruptcy Act, and George T. Goggin, as receiver of the debtor was authorized to conduct the business and sell the same as a going concern; he applied to said Board for, and was granted a seller's permit to engage in the business of selling tangible personal property, and during a period of a little over a month completed certain orders which the debtor had

on hand, sold the completed articles and paid sales tax on his retail sales as provided in said Sales and Use Tax Law.

On March 12, 1946, the West Coast Cabinet Works, Inc., was adjudicated bankrupt, and George T. Goggin as the appointed trustee was authorized to conduct the business of the bankrupt. As trustee in bankruptcy, Goggin applied for and was granted a permit to engage in the business of selling tangible personal property.

The evidence shows that between March 12, 1946, and March 22, 1946, in conduct of said business, the trustee made sales at retail and also sales for resale, and paid sales taxes. No tax is claimed by the Board to be due for such period.

On March 22, 1946, he was directed by order of the Referee to sell the assets of the estate either at public auction or private sale.

Subsequent to the order to sell in liquidation, the trustee, in addition to various sales for resale, made at least twenty sales which were listed on his books as sales at retail; on ten of the twenty sales the trustee 'collected sales tax reimbursement'; sales tax was reported and paid on all sales except certain sales made on March 29, 1946, as hereinafter set forth.

On said date last mentioned, the trustee sold, at public auction, in open court, and subject to confirmation of court, five trucks which had been used by the bankrupt in the conduct of his business for deliveries; each of said five trucks was sold to a different person; no 'sales tax reimbursement' was collected; the sales were confirmed by the court; the amounts received from such sales were not included in any sales tax return.

The Board made an additional determination of taxes due basing said assessment upon the gross receipts from the sales of the five trucks; notice of such assessment was mailed to the trustee, no petition for redetermination was filed within 30 days thereafter, whereupon a penalty of 10% was added by the Board to the amount of the tax.

The trustee petitioned for an injunction, and after a hearing before the Referee the order here sought to be reviewed was made. In said order, the Referee found that the sales of the five trucks were not made by the trustee in the course of conducting the bankrupt estate, but were made under court order in the normal administration of the estate in liquidating the assets for the benefit of creditors, subject to the confirmation of court and that the trustee was not liable to the Board for sales tax based upon said sales, and that the Board was attempting to enforce payment of the tax claimed."

Taxes Payable Upon Operation of Business.

In order that the problem be reduced to its simplest form we desire to take out of the present controversy all question pertaining to the various taxes, including Income Tax, Sales Tax, License Tax, etc., as may arise and be charged to a receiver or trustee in bankruptcy "who is authorized by the court to conduct any business, or who does conduct any business" with the admission that from and after June 18, 1934, "the said receiver and/or trustee shall be subject to all state and local taxes applicable to such business the same as if such business were conducted by an individual or corporation." The above quotation appears in the original Section 124a passed

June 18, 1934. Its present context as transferred into Section 960 in Title 28 U. S. C. A. (revised 1948), provides:

> "Any officer or agent conducting any business under authority of a United States Court shall be subject to all Federal, State and Local taxes, applicable to such business to the same extent as if it were conducted by an individual or corporation."

We strongly urge that when Congress passed Section 124a thereby "consenting" to place the tax burden upon the receiver and trustee when they operated the business that correspondingly there was a withholding of the right to tax the bankruptcy process, *i. e.,* the trustee's liquidation of assets.

If the taxing agency by the said section gained the right to tax when the business was operated, which right it admittedly did not have before, did it gain more? Was it accorded the right to interfere with the bankruptcy administration and the right to tax the very essential segment of bankruptcy administration, *i. e.,* liquidation of assets into cash for distribution to creditors. In Congress alone, under the Constitution, is vested the right to legislate upon the subject of bankruptcy. (Const., Sec. 8, Art. 1.)

As was recognized by the Supreme Court of California in *Fifth Street Building v. McColgan,* 119 F. 2d 729, *supra,* page 730,

> "Congress creates the trusteeship, fixes the conditions of its existence and may provide, as in the Act of 1934, that (where the trustee operates the business) a trustee be of such a nature as to come within the range of the state tax laws."

Congress has not seen proper to fix upon a trustee the "nature" of a seller or retailer, or to state that his duties under the Act in regard to selling in liquidation, after adjudication and under order of Court shall be regarded the same as if a private person or corporation was in the process of performing such acts.

In *In re California Pea Products,* 37 Fed. Supp. 658, *supra,* at page 661, it was stated:

> "The adjudication was ordered under Section 236 of the Bankruptcy Act, 11 U. S. C. A. 636, and the functions of the trustee in relation to the questioned sales were those and only those, prescribed in Section 238 of the Bankruptcy Act, 11 U. S. C. A. 638. In exercising such functions the trustee does not in the ordinary meaning of the term conduct any business."

The Court also ruled that the law did not specify a "trustee in bankruptcy" within the definition of person, and held that the referee in bankruptcy was correct in holding that the trustee there involved was not "one of the persons mentioned in the act as being engaged in the business of selling tangible personal property at retail" and even though the section of the California Statute was thereafter amended it still does not include "trustee in bankruptcy."

In *In re Davis Standard Bread Co.,* 46 Fed. Supp. 841, *supra,* the District Judge stated at page 842 that the trustee selling in liquidation, after adjudication and under order of Court was not engaged in the business of selling tangible personal property at retail within the meaning of the said law.

State Board of Equalization v. Boteler, 131 F. 2d 386, *supra,* at page 388, in affirming the decision in the *Davis*

Standard Bread case, held that the trustee was not engaged in the business of making sales at retail of tangible personal property.

The holdings of the three cases in our Ninth Circuit to the effect that the trustee was not engaged in business under the sales tax provisions of the law *were made separate and apart from any consideration of the fact that the law at that time did not include "trustee"* within the definition of person, and we are not persuaded that such rulings lose any weight by reason of the amendment. It is to be observed that the definition of "business" was the same then as it was when the trustee herein is claimed to have been liable under the law.

It is also to be noted that in each of the three decisions, the Court ruled that the trustee in carrying out his liquidation functions was not "conducting" any business within the meaning of 124a.

Little difficulty need be encountered in arriving at a determination as to when and under what circumstances a receiver or trustee is "conducting the business."

In re California Pea Products, 37 Fed. Supp. 658 (D. C. So. Cal.), decision by Judge Paul J. McCormick;

In re Davis Standard Bread Co., 46 Fed. Supp. 841 (D. C., So. Cal.), decision by Judge Ben Harrison;

State Board of Equalization v. Boteler, 131 F. 2d 386 (9th Cir.), affirming *In Re Davis Standard Bread.*

In these cases the determination was that the trustee was not operating the business and that Section 124a had no application and further that the trustees' liquidation sales were not taxable.

On the other hand, the cases of *Boteler v. Ingles,* 308 U. S. 57, and *United States v. Metcalf, Trustee,* 131 F. 2d 677 (9th Cir.), point out the applicable situation wherein the business is operated.

In order to bring the trustees' liquidation sales in for sales tax purposes, counsel for the appellant in his presentation before the District Court argued that the trustee should be considered as "conducting a business" when he acts as trustee in a number of cases at the same time and makes liquidation sales in each, *i. e.,* that he is conducting the business of being a trustee in bankruptcy and that his various trust positions should be aggregated and thus be charged with conducting "businesses" of a trustee in bankruptcy and therefore taxable under Section 124a. However, this specious argument was immediately rejected by the District Judge.

Likewise there appeared no basis for the "bridging over" argument by counsel for the appellant that the trustee once having been authorized to conduct the business could not terminate the operation and revert to the primary duty of liquidation of assets so as to distinguish operation of business sales from normal liquidation of asset sales. The District Judge said:

> "In the instant case, we do not believe that the fact that the assets sold by the trustee had been utilized by the bankrupt, the receiver, the trustee in bankruptcy or any one of them in the conduct of a business had any materiality in the case before us. Section 47a of the Bankruptcy Act, 11 U. S. C. A. 75a

by its terms charges the trustee with the primary duty of collecting and reducing to money the property of the estate; conducting the business is not a duty of a trustee as a matter of course, but a duty which may be imposed upon him by order of court, under Section 2(5) of the Bankruptcy Act, 11 U. S. C. A. 11(5), when such court, in the exercise of its discretion, determines such procedure to be 'necessary in the best interests of the estates.' (In re Weiner, 7 F. Supp. 691, aff'd 72 F. (2d) 1010.)

It is our view that after adjudication, when such conduct of the business has been authorized by the court, a subsequent order to sell in liquidation marks the termination of such authority, as well as the termination of the business, and is the line of cleavage between conducting the business and liquidating it. A trustee cannot then be considered as 'conducting the business of the bankrupt' within the meaning of Section 2(5) of the Bankruptcy Act, 11 U. S. C. A. 11(5), nor as 'conducting any business' within the meaning of Section 124a of Title 28, U. S. C. A., and any status such trustee may have been given by virtue of 124a as an 'individual' or 'corporation' conducting any business, is no longer to be attributed to him.

Likewise, we do not believe that the fact that the same individual, George T. Goggin, was the receiver who conducted the business, the trustee in bankruptcy who conducted the business, and the trustee in bankruptcy who sold assets of the bankrupt estate after adjudication under order of court in liquidation, has any materiality here. At no time, acting under the orders of the court, could George T. Goggin have acquired any personal status as a retailer by virtue of the acts performed under such orders."

Taxing Statutes.

The opinion of the District Judge summarizing the law and its development is as follows:

> The Sales and Use Tax Law of California is found in the Revenue and Taxation Code of said State. Division 1 relates to property taxation. Division 2 refers to ten other types of taxes, namely: Part 1, Sales and Use Taxes, Sections 6001 to 7176, and Parts 2 to 10 inclusive contain, respectively, sections relating to Motor Vehicle Fuel Tax, Use Fuel Tax, Motor Vehicle Transportation License Tax, Vehicle License Fee, Private Car Tax, Insurance Taxation, Inheritance Tax, Gift Tax, Personal Income Tax.
>
> Most of the provisions of the present law relating to sales tax were taken from similar provisions found in the Retail Sales Act of 1933, as amended in 1935, 1937, 1939 and 1941; the same is true of the provisions relating to use tax, which were based upon provisions of the Use Tax Act passed in 1935, and subsequently amended. In 1941, effective in 1943, the California Legislature combined most of the provisions of the two acts and the same were reenacted as the present Law and made a part of the Revenue and Taxation Code of the State of California as hereinbefore mentioned. Further amendments were made to some of the sections relating to either or both of the taxes in 1943, 1945, 1947 and 1949.
>
> Part 1 of Division 2 of the said Code "Sales and Use Tax Law" is divided into eleven Chapters. Chapter 1 contains definitions of various terms used in subsequent chapters, and Section 6002 of said chapter specifies that the definitions given in such chapter govern the construction of the Law except where the context otherwise requires; it is further stated

that by "sales tax" is meant the tax imposed by Chapter 2 of the Law, and by "use tax" is meant the tax imposed by Chapter 3 thereof.

Section 6005 defining "person" was originally Section 2 of the Retail Sales Tax Act of 1933, and read: "Person includes any individual, firm, copartnership, joint adventure, association, corporation, estate, trust, business trust, receiver, syndicate."

The Section was amended in 1935, 1937, 1939 and in 1941, to take effect in 1943, it was included as said Section 6005 of the Revenue and Taxation Code and from 1943 to 1945, the section included in its definition of "person" the following:

". . . any individual, firm, copartnership, joint adventure, association, social club, fraternal organization corporation, estate, trust, business trust, receiver, syndicate, this State, any county, city and county, municipality, district, or other political subdivision thereof, or any group or combination acting as a unit."

1945 Amendment.

In June of 1945, the section was amended to add the words *"trustee"* and "United States."

The District Judge in carefully analyzing the various provisions said in his Opinion:

"Section 6051 of Chapter 2 relating to sales tax recites, in part:

For the *privilege* of selling tangible personal property at retail a tax is hereby imposed upon all retailers at the rate of (3% after June 30, 1945) of the gross receipts of any retailer from the sale of all tangible personal property sold at retail in this State. . . .

Sections 6066, 6067, 6069, 6070 and 6071 have to do with the permit required by Section 6051 *for the privilege of selling tangible personal property at retail.* These provisions cannot be characterized as 'mere registration provisions to enable the State to know who is in business' as was explained with reference to the Arizona Occupation Tax in O'Neill v. United Producers Co-op., 1941, 113 P. 2d 645; these sections represent an integral part of the plan to secure collection of the taxes. There is a flat requirement for payment of a fee of $1.00 and the said sections place in the hands of the Board the *power to require security up to the amount of $10,000 as a condition to the issuance of a permit. A criminal penalty is imposed for selling without such permit,* after a hearing before it, *the Board may revoke such permit* for violation of any of the rules or regulations of the Board relating to the sales tax prescribed by the Board under the provisions of the Law; after such revocation, the permit may not be reissued until the Board is 'satisfied' that the taxpayer will comply with the Law and the regulations adopted by the Board.

Under Section 6796 it seems that the Board has authority at any time within three years after any person is delinquent in the payment of any amount, *to seize, without notice any property of the tax payer* and after notice to sell the same at public auction, and to hold the residue after the amount of the tax and penalties is satisfied for the claims of third parties. . . .

In addition to making it a misdemeanor to engage in business as a seller without a permit, the Law provides penalties for various other violations of the Law such as filing a false return, or *failing to fur-*

nish any data required by the Board; the maximum penalty prescribed being imprisonment for a year and a $5,000 fine."

The Appellant placed great weight upon the insertion by the California Legislature of the word "trustee" in the said taxing statute in 1945. At least, it was not until after this amendment when the Appellant opened up all of its guns in its attempt to collect the sales tax on bankruptcy liquidation sales.

To hold that the Legislature of California intended a trustee such as is here before us to be included within the definition of the word "person" as applied with reference to the sales tax provisions of said taxing statute, would be to imply that the Legislature intended the trustee here to be subject to none of the enforcement provisions which present a conflict with the Bankruptcy Act; this would result in an inconsistency between the section mentioning "trustee" and the enforcement provisions of said statute, or an emasculation of the law which would "deny the State the traditional and almost universal method of enforcing prompt payment" of the tax; or, we would be called upon to imply that the State intended to precipitate conflict or occasions for conflict between federal administration of the Bankruptcy Act and state administration of the Sales and Use Tax Law; or, that the State intended, in the absence of Congressional consent, to interfere with or to frustrate the execution of the powers conferred upon Congress by the Bankruptcy Clause of the Constitution.

We do not believe that the Legislature of California intended any of these obvious consequences as above mentioned. There are many persons, corporations or organ-

izations to whom the word "trustee" can apply consistent with all the provisions of the law, with the general purpose thereof, and without doing violence to the principles of statutory construction; *a trustee in bankruptcy, selling in liquidation, after adjudication and under order of the court is not one of them.*

Jurisdiction of the Bankruptcy Court Over Expenses of Administration.

If the trustee has incurred an obligation for sales tax as contended by the Appellant then the said charge is an "expense of administration."

Expenses of administration are payable under the provisions of Section 64a(1) (*i. e.,* the first priority) and thereafter the distribution follows (2) wages, (3) costs and expenses where confirmation of arrangement or discharge revoked or set aside, etc., (4) taxes legally due and owing by the bankrupt, (5) debts prior by the laws of the United States, and thereafter to general creditors.

In the administration of the bankruptcy estates before the Referee, the first order of payment upon distribution is those items in class (1), to-wit: the expense of administration. If a sales tax is owing by the trustee, as well as any other obligation incurred in the administration of the bankruptcy estate, it falls in this class.

There is no order of priority within the class. It is therefore imperative that the items of expense of administration must be ascertained, revealed and brought forward for the approval and order of payment by the Referee before the estate can proceed in distribution and before there can be payment to creditors, who were in existence at the date of bankruptcy.

If there is any such sales tax payable, it is an "expense of administration" under Section 62 and to be paid under Section 64a(1). In general bankruptcy practice the expense of the trustee's administration, to-wit: employment of adjusters, advertising, expense of sale, etc., is paid direct by the trustee and he reports the same to the Referee in his report and account, the approval of the report being the approval of the said disbursements. However, in disputed matters, including rental claims for occupancy of the premises by the trustee wherein there is usually a ground of disagreement, the said charge is reported to the Referee for payment. This follows, because the trustee does not want to be subject to surcharge in making payment in those matters wherein the Referee will not later authorize or approve the payment.

Thus in connection with sales taxes claimed upon liquidation sales of the trustee, the Referees have consistently held that those taxes cannot be paid. Parenthetically, we might observe that where the trustee operates and carries on the business, the said sales tax is paid without question. The Referees have made many orders in all known pending cases to the effect that the sales tax on trustee's liquidation sales of personal property cannot be paid.

Inasmuch as the bankruptcy court has jurisdiction over the distribution of its funds, it follows that the contended expense of administration, to-wit: the claim for the said tax may be "called in" before the Court. That is just what has been done in the instant case, wherein the said taxing agency has been requested to present to the bankruptcy court such claim or charge as it may have for the said sales tax. It is obvious that if the said claim is so presented that then and in that event the trustee will bring on appropriate objections thereto, placing the same in

issue and the trustee will contend that if the tax is so payable it be paid from the cash assets in the hands of the Court and being so paid (if finally ordered paid) the trustee will be protected in his individual capacity.

To turn now to the instant problem, we find the trustee ready to close the administration, and to distribute under the Order of the Referee the funds to the persons entitled thereto. This is a Court function, established by the Bankruptcy Act (Sec. 47A), and the one in which the creditors are most interested. In the present case the Referee during the administration had made Orders Confirming Sales of personal property. The questions then arose: 1. Should a sales tax be paid to the California State Board of Equalization upon the said liquidation sales? 2. What is the amount of the tax which should be paid? The trustee as aforesaid contended that there was no tax.

The demand by the Appellant against the trustee is most serious, especially the contention that the trustee could be held in his individual capacity therefore. The trustee herein, thereupon brought the matter before the particular Referee before whom the case was pending in administration.

The expense of administration in bankruptcy proceedings is dealt with under Section 62 which provides in part:

> "(a)(1) The actual and necessary costs and expenses incurred by officers, other than referees, in the administration of estates shall, except where other provisions are made for their payment, be reported in detail under oath, and examined and approved or disapproved by the Court. If approved, they shall be paid or allowed out of the estates in which they were incurred."

While this rule is statutory, there also is inherent jurisdiction given to any Court which administers the *res.* In other words, the funds in the custody of the Court, whether it be an equity receivership, corporate dissolution, a common fund in which many are interested, or a bankruptcy proceeding, being within the control and jurisdiction of the Court, may be chargeable by that Court with the expense of administration reduction to cash, cost of distribution, etc., thereof.

The same problem was presented in the case of *California Pea Products, Inc., 37* Fed. Supp. 658, upon almost the identical facts and it is interesting to note that in that case the provisions of the Bankruptcy Act (Sec. 62a(1)) were followed in bringing the matter before the District Court. An Order was made by Referee Ben E. Tarver at Santa Ana that the Board be restrained from proceeding against the said estate or L. Boteler, the trustee thereof, for the collection of the contended sales tax based upon liquidation sales made by the said trustee. A petition for review was filed to the Order of the Referee and the matter came on for hearing before Judge Paul J. McCormick of this Court. Quoting from portions of the Opinion of Judge Paul J. McCormick:

> "The Referee's order and injunction are attacked solely upon two grounds: (1) that said trustee in bankruptcy, L. Boteler, was selling on behalf of the bankrupt California Pea Products, Inc., machinery and equipment at retail within the contemplation of the California Retail Sales Tax Act, and that an injunction against the State Board of Equalization will not lie for the reason that the *said trustee in bankruptcy has under the California Retail Sales Tax Act an adequate remedy at law by paying the tax and suing to recover.*

Preliminarily, it is pertinent to observe that the petition for review originally contained a statement that the State Board of Equalization had filed in this bankruptcy matter its claim for sales tax due the State of California, and a part of the prayer of the petitioner on review was that this court on the review overrule any objections to said claim of the State Board of Equalization and allow said claim in full. By interlineations appearing upon the original petition for review, the aforesaid matters are stricken and are therefore not now a part of this review. *It thus does not appear that the State Board of Equalization has filed any claim for retail sales tax or in fact for any other tax in this bankruptcy proceeding,* or that an extension has been granted for the filing of any such tax claims.

In view of such situation, it is unnecessary on this review to go farther than to determine the validity and proper scope of the injunctive order issued by the referee. And until a claim for taxes is filed in this bankruptcy proceeding by the state authorities, *or until a 'bar order' is operative upon the state agency,* the question as to whether the trustee in bankruptcy in selling tangible personal property in liquidation of the bankrupt estate is a retailer and a person obligated to comply with the provisions of Act 8493 of the General Laws of the State of California is not properly before us.

It is, however, clear from the documentary evidence sent up with the referee's certificate that the State Board of Equalization had determined that the trustee was *'engaged in the business of selling tangible personal property, the receipt from retail sale of which are subject to the sales tax,'* and that such trustee was 'required by the California Retail Sales Tax Act' to secure a permit under the Act. Ac-

cordingly, *demand* was made by the state board for the *permit fee* provided in the act, and also that the trustee file quarterly returns in accordance with the Act under a likelihood or implied threat of being penalized for noncompliance with the demands of the state board, *and possibly of being sued in the state court for non-payment of taxes,* or at least of encountering some interference by the state board in the administration of this bankrupt estate. The probability of such an eventuality justified the referee in making an appropriate stay order. Section 2(15) Chandler Act. The possession of the property by the trustee is the court's possession, and any act interfering with the court's power of control and disposal and done without the court's sanction is void. Dayton v. Stanard, 241 U. S. 588.

The record shows that the trustee was not authorized by the bankruptcy court to conduct business under the permissive provisions of the bankruptcy act. Section 2(5) U. S. C. A. In fact, no application of any kind was made to carry on or to conduct business. On the contrary, *all of the selling activities of the trustee in bankruptcy were purely liquidating functions and in no proper sense should be considered in any other category.*

The tax claims referred to in sections 57(n) and 64(a) may be regarded as relating to matters and activities which have occurred *prior* to the filing of the petition in bankruptcy. The transactions upon which the state bases its contention in this review have all taken place *after* adjudication and the selection of the trustee in bankruptcy. The claims may therefore be considered as not strictly 'claims' against the estate within the contemplation of sections 57n and 64a, *but rather an expense of administration provided for in section 62 of the Act. But the same power*

of adjudicating such 'claims,' is vested in the bankruptcy court by section 62 as in the matter of tax claims under sections 57n and 64a.

The Supreme Court in Kalb v. Feuerstein, 308 U. S. 433, speaking of the broad and plenary power of courts of bankruptcy said, 'The Constitution grants Congress exclusive power to regulate bankruptcy and under this power Congress can limit the jurisdiction which courts, state or federal, can exercise over the person or property of a debtor who duly invokes the bankruptcy law.' See, also, Arkansas Corporation Commission v. Thompson, 116 F. (2d) 179 (C. C. A. 8th Cir.).

When a general reference has been made by the judge to a referee, as in this matter, he is, under the Chandler amendments to the Bankruptcy Act and under new General Order 12, *invested with complete jurisdiction of the proceedings,* and the Referee under such reference can do everything that the district judge can do, except certain specific powers which are reserved to the judge, but which are immaterial to this review or to the acts of the referee under consideration in this matter, under the factual situation shown by the record before us. See In re Munson, 11 F. Supp. 564.

We think, however, that the injunction and order under review is too broad. Mention has earlier been made of the modified and restricted scope of this review as shown by the interlineations on the petition for review, and although the briefs of the attorneys seem to assume that the record before us is sufficient and adequate to support a ruling determinative of a specific tax claim by the state board, no such claim has in fact been presented. There is, therefore, no basis for an injunction which so operates to *pre-*

clude the state board from presenting and filing a claim and having the same heard, considered and allowed or rejected by the referee as the situation may warrant.

Section 2(15) of the Bankruptcy Act empowered the referee to 'make such orders, issue such process, and enter such judgments,—as may be necessary for the enforcement of the provisions of this title, (act); provided, however, that an injunction to restrain a court may be issued by the judge only.' This statute, as well as General Order 12, effective February 13, 1939, is a rule of procedure relating to the remedy, and is applicable to this bankruptcy matter, and particularly, to the injunction herein which was issued March 22, 1940. And in arriving at the extent of power that is conferred upon the referee by section 2(15), the concluding clause of the subsection is a clear investiture in the referee under a general reference to issue all injunctions in the course of the bankruptcy proceeding necessary to prevent the defeat or impairment of his jurisdiction except that only a judge can enjoin a court. It would have been a simple matter for Congress to have made the prohibition against the referee's power to issue injunctions general if such had been the legislative intent. As no such intent appears but, on the contrary, only a single specific prohibition being shown, the referee is in all other instances vested with plenary judicial power to issue stay orders when acting under a general reference. See Collier on Bankruptcy (14th Ed.), Vol. I, page 277.

We conclude by holding that the findings, injunction and order of the referee, dated March 22, 1940, are modified as follows: The State Board of Equalization of the State of California, its officers, agents, employees and attorneys are, and each of them, is,

enjoined and restrained from in any manner enforcing or attempting to enforce any claim, tax, assessment, collection, penalties or sanctions provided in or pursuant to Act 8493 of the General Laws of the State of California against the estate of California Pea Products, Inc., a corporation, bankrupt, or against the trustee thereof, *or against L. Boteler, personally,* or against any property of said bankrupt, or of L. Boteler, or from in any manner interfering with the administration of this estate, without prejudice, however, to the *presentation and filing of any claim for taxes by the State Board of Equalization of the State of California,* its accredited and authorized officers, agents or attorneys, within the time allowed by law, and to having such claim considered by the referee *and its legality and validity determined by him, or without prejudice to a 'bar order' of the Referee."* (Italics ours.)

This Court in the case of *McColgan v. Maier Brewing Co.,* 134 Fed. 385 (9th Cir., March 10, 1943), determined that a state tax claim which arose during the pending bankruptcy proceeding was not a "provable debt" under Section 63 but was an expense of administration *and when not presented to the bankruptcy court during the administration thereof was barred.* From the opinion:

"The taxes accruing as a consequence of the operation of the business by the receivers were expense of administration. Remington on Bankruptcy, Vol. 2, p. 231; Heyman v. United States, 6 Cir., 285 F. 685; Hammond v. Carthage Sulphite Pulp & Paper Co., 2nd Cir., 8 F. (2d) 35; Central Vermont Ry. Co. v. Marsch, 1st Cir. 59 F. (2) 59; Prudential Ins. Co. v. Liberdar Holding Corporation, 2nd Cir., 74 F. (2d) 50; People of State of Michigan v. Michigan Trust Co., 286 U. S. 334, 52 S. Ct. 512,

> 76 L. Ed. 1136. They were not provable debts owing by the corporation itself, but were obligations of the receivership. In respect of the payment of administrative expenses, the statute (11 U. S. C. A. Section 102, sub. a) provides that unless other provisions for their payment are made they shall be 'reported in detail, under oath, and examined and approved or disapproved by the court. If approved, they shall be paid or allowed out of the estates in which they were incurred.' No other provision was made for the payment of these expenses. Thus the liability of the estate was dependent upon their being reported and their payment directed by court order."

Likewise in the case above referred to hereinabove (*State Board of Equalization v. Boteler*) the 9th Circuit in passing upon the action of the lower Court, which called in the state taxing agency for a determination of its alleged tax claim against the administration of the bankrupt estate, approved the determination of the lower Court and ratified not only its power of ascertainment but also its power of injunction. The Court said:

> "The trustee filed with the Referee in Bankruptcy a petition for an order restraining the Board of Equalization from attempting to collect this tax.
>
> The Referee granted the injunction, which was affirmed upon review by the District Court.
>
> He did not continue the bankrupt's business in any sense, but instead chose to dispose of the physical equipment in accordance with his duty in such manner as to realize the highest return for the estate he was administering. Section 47, sub. a of the Bankruptcy Act, 11 U. S. C. A. Section 75, sub. a. In our opinion the fact that these assets had previously been

utilized by the bankrupt in the conduct of a business no longer in existence has no materiality in the case. His activities did not render him taxable under the terms of the California Retail Sales Act."

As a further indication of the all inclusive power of the bankruptcy court to control the distribution of the funds in the bankrupt estates reference is made to the established practice (prior to the 1938 amendment of the Bankruptcy Act) of "bar orders" to bring in for filing and consideration of the bankruptcy court all tax claims owing by the bankrupt at the time of bankruptcy.

Remington on Bankruptcy, Vol. 2, Section 798, in discussing "bar orders" states:

"Prior to June 22, 1938, there was no provision in the Act making it obligatory for the United States, the states and subdivision thereof to file proofs of claim. Accordingly, a practice arose of entering bar orders, fixing a time within which the claims of governments should be filed. The 'bar order' technique in respect to tax claims was a natural development. It was designed to accomplish two objects, to remedy two weaknesses evident in the application of the general rule that the United States was entitled to file its claim for taxes at any time during the pendency of a bankruptcy proceeding and before distribution of the estate. It was developed, first, to permit an uninterrupted expeditious administration of the bankrupt's estate, and, second, *to protect the trustee of such estate from liability to tax claimants in distributing assets in the course of his administration thereof.* 'The technique is an extension of the policy followed in equity receiverships and has been considered in much detail in the second circuit. *In re* Swan, 82 F. (2d) 160.

In determining the legality and priority of tax claims, the Bankruptcy Act is paramount over other federal and state statutes. The bankruptcy court makes an independent determination of the validity of taxes in order to determine to what extent proofs for taxes should be allowed. It is not bound by the determination of administrative boards.' "

Excerpts From Brief Filed in State Board v. Boteler.

We quote hereinafter portions of the Brief which we filed with this Court upon behalf of L. Boteler, Trustee, Appellee, in the case of *State Board of Equalization v. Boteler,* 131 F. 2d 386, because we believe that what we said to the Court there is equally in point in the instant case.

"This case (State Board of Equalization of State of California vs. L. Boteler, Trustee) stripped down to essentials, simply resolves itself into two questions:

1. Has the State of California, or any other State in the Union, the right to project itself into the administration of bankrupt estates, a field reserved entirely to Congress, and to require officers of the United States District Court to take out licenses permitting them to convert the bankrupt's assets into cash and then to impose a tax on the proceeds of such judicial sales?
2. Has the United States District Court the power and jurisdiction to protect its own officers from such illegal encroachment upon their duties and prerogatives as is here sought to be inflicted by the State of California?

Under Section 8, Article 1, of the Constitution of the United States, Congress is given the sole and exclusive power to 'establish uniform laws on the sub-

ject of bankruptcies throughout the United States.' Acting under this grant of power Congress enacted the National Bankrupt Act which defines, among other things, the jurisdiction of the United States District Courts in bankruptcy matters and the rights and duties of a trustee thereunder.

Section 2 of the Bankruptcy Act (11 U. S. C. A., Sec. 11), confers jurisdiction on United States Courts, among other matters, as follows:

Subdv. (15). 'Make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this Act; provided however, that an injunction to restrain a court may be issued by the judge only.'

Subdv. 21-b of Section 2 expressly provides:

'Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated.'

Section 75(a) prescribes that mandatory duties of the trustee are as follows:

'Trustees shall (1) collect and reduce to money the property of the estates for which they are trustees, under the direction of the court, and close up the estates as expeditiously as is compatible with the best interests of the parties in interest.'

As hereinafter pointed out, the Supreme Court of California in Donnelly v. Southern Pacific Co., 18 Cal. (2d) 863, recognizes this rule in an opinion involving a judgment for damages for personal injuries sustained by a person in a railroad collision, while traveling on a free pass, regulated by Interstate Commerce Acts, and after discussing the various

federal and state decisions involving the right to recover from a common carrier while riding on a free pass, the Supreme Court, in reversing the judgment of the Superior Court, said:

'This negligence may have been gross under the California rule, but the Federal cases are clear that such dereliction constitutes negligence and not wanton and reckless misconduct.'

In this connection the rules laid down by the Supreme Court of California in Bigsby vs. Johnston, 18 Cal. (2d) 860, and Union League Club vs. Johnson, 18 Cal. (2d) 275, are entirely beside the point. Neither Bigsby nor the Union League Club were trustees in bankruptcy, nor were they sales upon which the State imposed a tax, judicial sales conducted under a United States Statute in a United States Court; neither was any mandatory duty imposed upon them to make these sales. If they desired, they had a right to retain the property. A trustee in bankruptcy has no such right, as the statute under which his office is created requires him to collect and reduce to money the property for which he is trustee, under the direction of the court, and to close up the estates as expeditiously as is compatible with the best interests of the parties in interest. (Bankruptcy Act, Sec. 47a, 11 U. S. C. A. Sec. 75a.)

ANY PROVISION IN THE RETAIL SALES ACT OF CALIFORNIA OR THE RULES AND REGULATIONS OF THE STATE BOARD OF EQUALIZATION UNDER WHICH IT IS CONTENDED ADDITIONAL BURDENS OR DUTIES MAY BE IMPOSED UPON A TRUSTEE IN BANKRUPTCY, IS IN CONFLICT WITH ITS APPLICABILITY TO FEDERAL LAW, AND IS UNCONSTITUTIONAL.

It has long been settled that where Congress exercises its exclusive jurisdiction, as in the domain of interstate commerce, bankruptcy, naturalization, and

other exclusive legislative fields delegated to it, all state laws on those subjects are superseded; as, for instance, upon the enactment of the Bankruptcy Act of 1898, after a long period during which this country had no Bankruptcy Act, all State Insolvency Laws were suspended and superseded and their courts deprived of jurisdiction over the subject. Holmes vs. Rowe, 97 F. (2d) 537 (C. C. A. 9th Cir.); *In re* Brinn, 262 F. 527.

In Keystone Driller Co. vs. Superior Court, 138 Cal. 738, the court said:

'Our State Insolvency Law is suspended by the National Bankruptcy Law of 1898.'

In Continental Building & Loan Association vs. Superior Court, 163 Cal. 579, the Supreme Court said:

'If these positions are well taken the conclusions for which petitioner contends is irresistible, for it is conceded that petitioner is a corporation conducting a business which brings it within the scope and purview of the National Bankruptcy Act, and it is unquestioned that when the general government has spoken upon the subject of bankruptcy, the operation of all state laws upon the same subject matter is suspended. The ultimate question then, is whether under these concessions and admissions there is still left in the state law any valid provisions entirely without the scope of the National Bankruptcy Act, which provisions may be enforced by the State Courts, or whether, as petitioner contends, the state law is as a whole, and without severable or separable parts a single bankruptcy or insolvency act.'

In the latter case the Supreme Court of California held that a punitive law requiring liquidation of building and loan associations under certain condi-

tions not constituting an act of bankruptcy, did not conflict with the Bankruptcy Act, but nevertheless, recognized the principle that when Congress has legislated on the subject, the State law is powerless.

In the recent case of Donnelly vs. Southern Pacific Co., 18 Cal. (2d) 863, involving a California Statute and its operation on passengers traveling in interstate commerce, the Supreme Court says:

'If a statute is enacted by Congress covering the subject of the state's regulation, it supersedes the state statute or decision. Southern Ry. Co. vs. Railroad Commission of Indiana, 236 U. S. 439; Southern Express Co. vs. Byers, 240 U. S. 612; Adams Express Co. vs. Croninger, 226 U. S. 491; Western Union Tel. Co. vs. Speight, 254 U. S. 17; Western Union Tel. Co. vs. Commercial Milling Co., 218 U. S. 406. If, however, Congress enacts a statute that embraces the general field but does not cover the matter on which the state has ruled, the state statute or decision is superseded only if Congress intended by such legislation to occupy the entire field, thereby excluding all state control. Atchison T. &. S. F. Ry. Co. vs. Railroad Commission, 283 U. S. 380; Kelly vs. Washington, 302 U. S. 1; H. P. Welch Co. vs. New Hampshire, 306 U. S. 79; Kansas City So. Ry. Co. vs. Van Zant, 260 U. S. 549; Southern Express Co. vs. Byers, *supra,* and numerous other citations. The state courts are then bound by federal decisional law in the field. Kansas City So. Ry. Co. vs. Van Zant, *supra;* Southern Express Co. vs. Byers, *supra;* Adams Express Co. vs. Croninger, *supra*; Western Union Tel. Co. vs. Speight, *supra.*'

We think it is clear that Congress intended to legislate fully with regard to the qualifications and duties of trustees in bankruptcy. It has not seen fit

to require them to take out sales tax license from the States permitting them to perform their mandatory duties. The fact that Congress in 1934 enacted Section 124a of Title 28 of U. S. C. A., requiring 'any receiver, liquidator referee, trustee, or other officers or agents appointed by any United States Court *who is authorized by said court to conduct any business and who does conduct any business* shall, from and after June 18, 1934, be subject to all State and local taxes applicable to such business the same as if said business were conducted by an individual or corporation,' does not mean a thing in this case. In the first place, it does not purport to be an amendment to the Bankruptcy Act, which expressly prescribes the duties of the trustee. In the second place the trustee here is not operating the business, but is liquidating it in accordance with the plain mandate of the law. Trustees in bankruptcy stand in a much more advantageous position than do receivers in equity, assignees for the benefit of creditors, and other types of liquidators. The Federal Courts make a distinction between the disabilities of equity receivers and of receiverships so operated and the privileges accorded to a trustee or receiver in bankruptcy. For example, in Southern Bell Telephone Co. vs. Caldwell, 67 F. (2d) 802, in discussing the question of priorities in bankruptcy as distinguished from equity receiverships, the Circuit Court of Appeals for the Eighth Circuit said:

'It is conceded that there is no decision in bankruptcy affording any support to the appellant's claim of priority. The equity foreclosure cases like Miltenberger vs. Logansport C. &. S. W. R. Co., 106 U. S. 286 (and a number of other cases cited) —are without application, and we have no occasion to review them.'

Furthermore, the very fact of the passing of the statute referred to (Section 124a, Title 28 U. S. C. A.) indicates clearly that Congress felt that prior to June 18, 1934 trustees in bankruptcy *operating a business* under the provisions of Subdv. (5) of Section 2 of the Bankruptcy Act were exempt from all taxes imposed by States and local municipalities during the period of their operation, and by the enactment of this statute permitted States and local political bodies to levy taxes on the actual operation of such business.

A great deal of the difficulties which trustees have been encountering with the State Board of Equalization in the last several months are occasioned by a misinterpretation of the case of Boteler vs. Ingals, 308 U. S. 57. In that case, Boteler, as trustee in bankruptcy, was operating a large dairy. He had a number of milk trucks making daily deliveries throughout Los Angeles County and operating on the public highways. On January 1st he did not have sufficient funds in his possession to purchase new license, and the same condition existed after the deadline for obtaining new licenses without penalty on February 5th had passed. Shortly after February 5th he obtained sufficient money to purchase licenses and applied to the Motor Vehicle Department for new licenses for his trucks, tendering it the normal fee. The Motor Vehicle Department refused to issue the licenses without payment of the penalty and Boteler sought *mandamus* from the Referee. The Referee entered an order requiring the issuance of the licenses, which order was affirmed by the District Court, both lower courts holding that the trustee was not subject to such penalty. This court reversed the order, and the Supreme Court granted certiorari. In the opinion in that case Mr. Justice Black was

careful to point out that the trustee was *operating the business* and that the penalty constituted a license fee for the privilege of using the highways of the State of California, and that if the trustee saw fit to use the highways in the conduct of the business he was required to comply with the reasonable police regulations of the State.

HAS THE TRUSTEE A PLAIN, SPEEDY AND ADEQUATE REMEDY AT LAW SUCH AS WOULD BAR HIM FROM INJUNCTIVE RELIEF HERE?

We believe that the contention in the lower court that the trustee is not entitled to injunctive relief is wholly and completely without merit. Here we have the situation of a State Board seeking to interfere with a trustee, an officer of the United States Court, in the conduct of his mandatory duties, and demanding that he take out a license under penalty. (See Sales Tax Act, Sec. 15.)

To say that such court has not the power to protect its officers in the control and disposal of property in its possession and in the performance of their mandatory duties would, we believe, on its face, seem ridiculous. (See Dayton vs. Standard, 241 U. S. 588.) However, Federal Courts have jurisdiction also to enjoin enforcement of an unconstitutional State statute by State officers clothed with authority to enforce it where it violates Federal Constitution. See: Tyson & Bro. United Theatre Ticket Officers vs. Banton, 273 U. S. 418; Pennsylvania vs. West Virginia, 262 U. S. 553; Fox Film Corp. vs. Trumbull, 7 F. (2d) 715; McNaughton vs. Johnson, 242 U. S. 344; Claybrook vs. City of Owensboro, 16 F. 297; Wells Fargo & Co. vs. Taylor, 254 U. S. 175; Caldwell vs. Sioux Falls Stockyard Co., 242 U. S. 559.

The right to enjoin a state officer from enforcing a state statute claimed to violate the Federal Constitution is not affected by whether the enforcement is to be by civil or criminal proceedings. See: Van Deman & Lewis Co. vs. Rast, 214 F. 827; Yee Gee vs. City & County of San Francisco, 235 F. 757; Pierce vs. Society of the Sisters, 268 U. S. 510.

It has been held that the institution of separate actions to recover fees paid under an alleged unconstitutional statute is not adequate remedy at law, as was contended by the Attorney General. See: Wofford Oil Co. vs. Smith, 263 F. 396.

It has also been held that a Federal Court has jurisdiction to enjoin the enforcement of a state statute which is unconstitutional and void, and under which the authorities threaten to seize complainant's property and destroy his business unless he pays a license thereby imposed. See: Minneapolis Brewing Co. vs. McGillivray, 104 F. 258.

In the case at bar, under the State's theory the trustee in bankruptcy, an officer of the United States District Court, should pay this illegal tax and license fee out of funds in *custodia legis* in a Federal Court, to a State Board, and then, notwithstanding the fact that he is an officer of the United States District Court, go into the State courts and maintain expensive litigation to recover it back. Such requirement would be absolutely unreasonable. The State Board of Equalization is demanding that the Bankruptcy Court and its officers pay over to it certain sums of money, disbursement thereof being required to be made by check or draft on designated depositories of bankruptcy funds.

THE CONTENTION THAT THE REFEREE ACTED BEYOND HIS JURISDICTION IS WHOLLY WITHOUT MERIT, AS THE REFEREE IS NOT SEEKING TO RESTRAIN A COURT.

It was contended by the Attorney General in the District Court that a Referee in Bankruptcy has no power to enjoin a State officer in the enforcement of a State Statute. With that we disagree.

Section 38 of the Bankruptcy Act, 11 U. S. C. A., Sec. 66 vests the Referee, subject to a review by the Judge, with jurisdiction to, '(6) Perform such of the duties as are by this Act conferred upon Courts of Bankruptcy, including those incidental to ancillary jurisdiction, and as shall be prescribed by rules or orders of the Courts of Bankruptcy of their respective districts, except as herein otherwise provided.'

Section 2, Subdv. (15), 11 U. S. C. A., Sec. 11, Subdv. (15) vests Courts of Bankruptcy with jurisdiction to, 'Make such orders, issue such process, and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this Act. Provided, however, *that an injunction to restrain a court may be issued by the Judge only.*'

That an injunction will lie against a State Board or Commission to prevent a violation of the rights of a party under the Federal Constitution, has been held in Union Light, Heat & Power Co. vs. Railroad Commission of Kentucky, 17 F. (2d) 143; also, Evansville Brewing Ass'n. vs. Excise Commission of Jefferson County Alabama, 225 F. 204.

The only jurisdiction now expressly withheld from Referees under a general Order of Reference is the power of commitment for contempt. (Bankruptcy

Act, Sec. 38, Subdv. 2.) Under the act of 1938 a general Order of Reference is sufficient to vest them with jurisdiction to adjudicate bankrupts or dismiss petitions, to grant or revoke discharges, and perform many other judicial acts which under preceding bankruptcy laws they were only permitted to certify to the District Judge for determination.

We respectfully submit that the Referee did not act beyond his jurisdiction."

Answer and Reply to Appellant's Brief.

We believe the issue in this case may be reduced to a single determination. In fact the Appellant states: (App. Br. p. 10):

> "Briefly summarized, however, appellant submits that the record herein establishes clearly that the five trucks sold on March 29, 1946, were sold by appellee during a period in which he was operating the business of the bankrupt. *It is not disputed that the five sales of trucks were liquidating sales.*"

And at page 20:

> "The only question remaining for consideration, therefore, is whether gross receipts derived by appellee from the sale of capital assets, namely, five trucks held by him in the course of his retail sales activity, are includible in the measure of the tax imposed upon appellee as a retailer under the California Sales and Use Tax Law."

It Is Immaterial Whether "Liquidation" Sales of Trucks Were Before, During, or After Trustee's Operation.

It hardly appears necessary to straighten out such hiatus as is suggested by counsel for appellant between the stipulation of Goggin, trustee, and the findings upon the question of whether the "operation of the business" covered a period to March 22, March 29 or May 1, 1946.

In any event the Brief of the Appellant states (and we agree) that,

(1) (page 10) "It is not disputed that the five sales of trucks were *'liquidation sales.'*"

(2) (page 8) That all of the retail sales effected by Goggin, both as receiver and trustee in the "*operation of the business*" were reported by him and the sales tax paid by him thereon (other than the tax on the said liquidation sales of the five trucks).

The District Judge in his Opinion in what he believes is an all inclusive summary of the entire subject of the applicability of State Sales Taxes to bankruptcy administration (and from which we have hereinabove extensively quoted) discussed many collateral points of general interest on the subject.

The Problem Simply Stated.

However, it occurs to us that the only question before the Court here is: "*Should the trustee be required to pay a sales tax upon his bankruptcy liquidation sales of the five trucks?*" The question presented to this Honorable Court in *State Board of Equalization v. Boteler (In re Davis Standard Bread Co.)*, 131 F. 2d 386, Nov. 10, 1942, bears great similarity. Therein the kindred question

was "should the trustee in bankruptcy pay a California sales tax upon sales of *'furniture, fixtures, equipment and other miscellaneous items of the business.'*" (From the opinion, page 387.)

> "It cannot be doubted that if the authorities can be read so as to support the proposition that the trustee in making the sales in question is 'carrying on the business' the tax attempted to be imposed would be proper. We think they cannot be so read."

and page 388:

> "His (Boteler, the trustee) activities did not render him taxable under the terms of the California Retail Sales Act. . . ."

To delineate the problem further we can point out that as conceded by the State Taxing Agency, the sale of the five trucks was a *liquidation sale*. Certainly it was no part of the "operation of the business."

It makes little difference whether it was made before or after or during the period of the operation of the business. The bankrupt was engaged in manufacturing wooden cabinets and like fixtures and not in the operation of a used truck business. Therefore we conclude that the problem should be considered solely upon the basis of whether or not sales tax on liquidation sales should be paid by a trustee in bankruptcy.

The Fundamental Question Has Already Been Answered by This Court.

It was our view that the Court's decision (*State Board of Equalization of State of California v. Boteler*) *definitely* settled that question.

Reliance Upon Court's Prior Decision.

At least following that decision the trustees in bankruptcy in the many bankruptcy proceedings pending before the United States District Courts within the State of California have not paid any sales tax on their liquidation sales. In fact the bankruptcy courts (both the Referees and the United States District Judges) have made numerous orders prohibiting them from paying the same.

Many thousands of bankruptcy estates during the interim have been administered, distributed and closed without the payment of the said sales tax.

Answer to Appellant's Specifications of Error.

The Appellant contends under "D—Specification of Errors", page 11, that the District Judge "failed to give effect to the provisions of Section 960, 28 U. S. C. A., which provides that any officer or agent conducting any business . . . shall be subject to all state taxes applicable to such business." And we submit that the said segregation of the District Judge was correct.

It Is Possible That Trustee Who Acts as Employer and Hires Assistants May Be Required to Pay Tax Because Thereof.

The Appellant cites the case of the 8th Circuit decided in 1943, *State of Missouri v. Gleick,* 135 F. 2d 134, in support of its contention that trustees in bankruptcy in liquidating estates in bankruptcy were "operating" or "conducting" the business of the bankrupt. However, the said case merely determines that where the trustee in Missouri employs persons to work for him that he is an employer and liable to the Missouri Unemployment Law for contributions. To the same effect is the case of *In*

re Mid American Co., 31 Fed. Supp. 601, charging the trustee in bankruptcy with the tax upon his employees in Illinois.

We believe the result reached in the two cases is predicated on the facts that the trustee in bankruptcy when he employed individuals was actually an *"employer"* under the said state section. We believe the same decisions could have been arrived at without any reference to the provisions to Section 960, 28 U. S. C. A. The Judge in the latter case said, "There is no judicial warrant for construing Section 124a (Sec. 960, 28 U. S. C. A.) in such manner as to deprive employees of the trustee of the benefits of coverage under the Illinois Unemployment Compensation Act. . . . merely because their services were performed for a trustee in bankruptcy . . . defined as an 'employment unit' in the Illinois Unemployment Compensation Act."

In other words there could be no tax upon the trustee's activity, upon his official duties, *but* when he goes beyond that and becomes an employer the said courts held he should pay the tax as an employer.

What Was Intended by Congress Through Adoption of Section 124a, Title 28 U. S. C. A.?

The legislative background of Section 124a, Title 28 U. S. C. A. shows that in certain large operating bankruptcies the receivers and trustees were carrying on oil businesses and not paying any of the tax as was required by competing businesses. The argument before Congress was to remove this restriction and to compel the receiver and/or trustee who so operated a business to pay the tax. This argument was perfectly logical and effective from and after June 18, 1934. The receiver or trustee

who was authorized by the Court to *conduct any business* or who does conduct any business, is subject to the tax applicable to said business the same as if such business were conducted by an individual or corporation.

We pause here and point out that the trustee is not *authorized* by the bankruptcy court to conduct his *statutory duties of liquidation as required by the Bankruptcy Act.* The duty to liquidate is inherent to the office. So it is quite obvious that the reference to "conduct of the business" as referred to in the said Act is not to the bankruptcy statutory liquidation process but the reference is to a carrying on "as if the business were conducted by the bankrupt."

And, that is not only the general view of the 9th Circuit, but also the definition given in *State Board of Equalization v. Boteler.*

Many of Appellant's Objections and Complaints Have Already Been Answered.

The Appellant under its argument under "E," "F," "G", "H", "I", pages 11 to 13, raises questions and criticisms objecting to the manner in which it was called into the Bankruptcy Court, the "suit" against it, the fact that it was not a "party" to the bankruptcy proceedings, the injunction against it and the overall jurisdiction (or lack thereof) of the Bankruptcy Court.

These same general points and contentions were raised in the prior case of this court referred to hereinabove. They were likewise raised before Judge Paul J. McCormick in the *California Pea Products* case. And, we do not see in Appellants present arguments any reason to assume that this Honorable Court will be influenced thereby.

We do again state we do not believe there is any substance whatsoever to Appellant's argument that the tax should be charged because the liquidation sales of the trucks were made at a time (if such was the case) while the trustee was, on the other hand, operating the business. The said contention of Appellant being that the said liquidation sales should be included and aggregated with the "operation of business" sales and the tax paid thereon.

We believe that the law has already been established that there is no sales tax on trustee liquidation sales regardless of the time made in the bankruptcy administration.

We are much more vitally concerned with the Appellant's contentions under "D", page 26:

> "Trustees in Bankruptcy are subject to the California Sales and Use Tax Law even though they engage solely in liquidation activities if they make a sufficient number of retail sales."

"E", page 29:

> "Trustees in Bankruptcy making liquidation sales only are retailers within the purview of the California Sales and Use Tax Law if the sales are sufficient in scope and number."

"F", page 30:

> "There is no Federal Constitutional or Statutory prohibition against the imposition of a non-discriminatory state tax upon trustees in bankruptcy."

These contentions could only be supported on one or the other of the following:

1. That the trustee in making his sales is a "retailer" under the State Statute. That the State Statute was amended to include a "trustee" and that this referred to and included "trustee" in bankruptcy.

2. That there is no Federal Statutory Prohibition against levying the said tax.

3. That although it is conceded that the sales tax is upon the trustee as the seller that no burden is cast upon the trustee.

These very points were considered by the Court in *State Board of Equalization v. Botcler* with the exception of the question of the subsequent amendment which added "trustee."

However, it follows from the said decision that such amendment could not in any manner effect the result thereof. The Court considered the then Section 124a, Title 28 U. S. C. A. as the conferring by the Federal authority of the right to the State to tax the bankruptcy administration when the business of the bankrupt was conducted. The Court said, *State Board of Equalization v. Boteler*, p. 387:

> "It cannot be doubted that if the authorities can be read so as to support the proposition that the trustee in making the sales in question is 'carrying on a business', the tax attempted to be imposed would be proper. We think they cannot be so read."

Interference With Bankruptcy Administration.

The California sales tax is payable by and charged to the seller who must take out the permit, make the reports, etc. In the case, *City of New York v. Jersawit*, 85 F. 2d 25 (2nd Cir.), the Court in referring to the collection by a trustee of a consumer tax of the City of New York upon sales said:

> "A tax on a sale made by a trustee under an order of court for purposes of liquidation if payable directly and primarily by him would doubtless be a burden on a governmental instrumentality, for a judicial sale in liquidation of a bankrupt estate would in a peculiar sense involve the exercise of a federal function. Indeed, without the exercise of such a function and the power thus to dispose of assets, administration in bankruptcy would hardly be practicable. A tax on the vendee in connection with a sale in liquidation of a bankrupt's estate is, at least in a formal sense, quite different from a tax for which the vendor is made primarily liable."

Thus we see the inapplicability of that case to the provisions of the California Sales Tax. Appellant argues that we should consider this case as persuasive here.

Is There Interference Imposed Upon the Trustee by the Terms of the Sales and Use Tax Law of California?

This is what the liquidating trustee is confronted with:

(a) Section 6051 of Chapter 2, Revenue and Taxation Code of California provides, "for the *privilege* of selling tangible personal property at retail a tax is hereby imposed. . . ."

(b) Section 6066: "Every person . . . shall file with the board an application for permit for each place of business. . . ."

(c) Section 6067: "at the time of making an application the applicant shall pay to the board a permit fee. . . ."

(d) Section 6070, Revocation of Permit: "The board shall not issue a new permit after the revocation of a permit unless it is satisfied that the former holder will comply, etc."

(e) Section 6203: "Every retailer . . . shall . . . collect the tax from the purchaser."

(f) Section 6207: "Every person violating Sections 6203 (collection from purchaser) and 6205 (advertising that tax will be assumed or not added to selling price) 6206 (displaying tax separate from list price) shall be *guilty of a misdemeanor.*"

(g) Section 6226: "Every retailer . . . shall register with the board and give name and address of all agents operating in this state . . . and such other information as the board may require."

(h) Section 6452: ". . . A return . . . shall be filed with the board."

(i) Section 6511: "If a person fails to make a return, the board shall make an estimate . . . adding . . . penalty equal to 10 per cent thereof."

(j) Section 6514: "If failure of any person to file a return is due . . . an intent to evade this part or rules and regulations a penalty of 25 percent."

(k) Section 6701: "Security. The board, whenever it deems it necessary to insure compliance . . . may

require any person subject thereto, to deposit with it such security as the board may determine, The board may sell the security at public auction . . ."

(1) Section 6796: ". . . the board may forthwith collect . . . the board shall seize any property . . . and sell . . . at public auction."

We submit that these processions do place a huge burden on the trustee. He must obtain a permit to perform his duties. He must pay for the permit. He is put to a very considerable expense by the state law. His activities are interfered with. It is quite obvious that the enforcement Sections were never intended to apply to trustees in bankruptcy.

The Appellant does not appear to be concerned with anything except the affixing of the tax liability upon the trustee and its attitude is that if it can do so then regardless of its many regulations it will only apply those against the trustee which do not interfere with his Court duties.

And, we submit that the imposition of the sales tax is not only a "burden on the governmental instrumentality" (as referred to in the above *City of New York v. Jersawit* case), but it also is a harmful interference with the bankruptcy administration not sanctioned by Congress.

If this sales tax is payable as contended on liquidation sales by trustees in bankruptcy then it is quite apparent that all such trustees in bankruptcy in California have been and now are committing crimes under this State Statute.

Conclusion.

We respectfully submit that the Orders of the Referee and the District Judge should be affirmed.

Respectfully submitted,

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Amici Curiae,